Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Retention by Broadcasters of Program Recordings	)	MB Docket No. 04-232
	)	

COMMENTS OF THE SCHOOL BOARD OF BROWARD COUNTY

The School Board of Broward County ("SBBC"), by its attorneys, submits these Comments in response to the Notice of Proposed Rulemaking in the captioned docket. There, the FCC proposes to require licensees to record their programming as a means of facilitating agency enforcement of the rules restricting obscene, indecent or profane broadcast. Although SBBC applauds the Commission's resolve to refine its administration of the indecency rules, the proposal set forth in the NPRM is wholly inappropriate without certain modifications.

I. The School Board of Broward County

SBBC is the licensee of noncommercial educational television station WPPB-TV, Channel 63, Boca Raton, Florida, and noncommercial educational FM radio station WKPX, Sunrise, Florida. SBBC is charged with educating approximately 279,000 students enrolled in 215 schools and centers. As such, SBBC is hardly a likely purveyor of indecent broadcast material.

SBBC broadcasts educational programming that simply does not generate indecency complaints. Indeed, no indecency complaints have ever been lodged against SBBC.

II. Analytical Framework

When an evocative issue such as the regulation of indecent programming is under review – especially when, as here, it has been put into play by highly publicized Congressional furor – there is an understandable tendency for agencies to react in a dramatic and sometimes sweeping

fashion. The public interest, however, is a complex of interdependent variables. Regulations contemplated in order to resolve one perceived problem can affect other critical aspects of the public interest not directly under review. Thus, while decisiveness can be a virtue, a show of action should not proceed without attention to all the ramifications of the proposed regulation.

Ensuring that the public interest is properly served requires making explicit the variety of interests that a particular proceeding implicates, and then considering the extent to which a proposed rule affects the public interest in its broader contours. This dynamic is the reason that the economic cost of regulation should nearly always play a key role in settling on the final form of proposed rules. This is especially important where small operations are concerned. If a regulation is too burdensome in terms of the economic cost entailed by compliance, it can adversely affect the ability to provide services deemed vital to the public interest in other ways. For instance, in the broadcast context, the provision of local news is a service the FCC recognizes as quintessentially in the public interest. Yet, it is a dimension of station operations that is under constant scrutiny as an item of operating budget.

The dynamics described above can produce irrational results when an industry-wide regulation is imposed in reaction to the behavior of only a small fraction of the industry's participants. In that case, the regulation is objectionable not only because it will undermine other variables affecting the public interest, but because its over-breadth is a sure sign that it has not been carefully enough crafted.

Finally, in a related sense, the integrity itself of the regulatory process requires that a new rule be a fair and principled response to the events in the external economic environment that triggered the rule making in the first place. Among other things, this means that regulations designed to control proscribed behavior are directed to the actual source of the controversy. The

issue here is not so much an over-breadth problem, as it is ascribing blame and liability where they originate, whether the innocently affected are a universe of one or of thousands.

As shown below, the rule as proposed in the NPRM is objectionable because it succumbs to precisely these dangers.

III. The Proposed Rule Would Harm Broadcasters Who Are Not Offenders

Imposing additional regulatory burdens on independent broadcast operations such as SBBC can only detract from their ability to continue providing vital service to the local community.

The proposed mandate would require SBBC to acquire a recording device, archive media and a greatly expanded storage capacity. Moreover, the proposed new recording and record-keeping requirements would be labor intensive.

Thus, the personnel resources that would have to be devoted to the increased recording and record keeping activities required by the proposed rule would be even more burdensome than the capital expenditures involved.

Significantly, equipment reliability would become an issue if the FCC adopts this proposed change. If the stations are unattended, the failure of a recording device will not be discoverable. Thus, to prevent gaps in any required archive, broadcasters would be compelled to devote staff to monitoring the recording device around the clock.

Small operations, and especially those such as SBBC that broadcast educational programming, have no incentive to broadcast indecent material. The cost of compliance with these new regulations is therefore disproportionate to any public benefit that the FCC is attempting to safeguard here. Indeed, the cost involved outweighs any benefit whatsoever.

IV. The Proposed Rule is Overbroad

The proposed rule is manifestly overbroad. The rule would to all television, FM and AM facilities. As of December 31, 2003, 11,011 FM and AM radio stations were in operation.[1] In addition, there were 1,733 full power television stations in the Unites States, as well as 605 Class A and 2,129 low power stations. The rule would thus affect nearly 4,500 television station licensees, as well as more than eleven thousand radio operations.[2]

Notwithstanding this substantial number of stations – in excess of 15,000 – only a very small percentage actually have indecency complaints lodged against them in the course of a given license term. The reason for this is quite simple: For the majority of broadcasters, their economic model does not depend upon – and indeed would be undermined by – the transmission of programming that violates the Commission's indecency rules. To state this point in terms of the 'economic actor' model heavily employed by the Commission in its policy analyses, the majority of broadcasters are fundamentally *disincented* from airing programming that risks exposure an indecency finding by the Commission.

SBBC does not have statistics available to it that would quantify this point precisely, but the Commission has provided a clue at note 8 of the NPRM. There, the FCC says during the years from 2000 to 2002 (inclusive), it received 14,379 complaints covering 598 programs. This datum demonstrates that the problem is a narrow one. The Commission does not break this figure down between radio and television, but for the purpose of conservative analysis let us suppose all of the complaints were leveled against radio stations only. Assume, further, conservatively, the typical radio station airs only six programs per day: 11,011 radio stations air six programs per day x 365 days. The result is that about 24 million programs would been broadcast

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[1] FCC Public Notice, Broadcast Station Totals as of December 31, 2003 (rel. Feb. 24, 2004).
[2] Id.

per year. Over the three years (*i.e.*, 2000 through 2002) mentioned in note 8, this would mean that the universe of programs was on the order of about 72 million programs. Of this, only 598 programs received indecency complaints. That means that the proportion of programs drawing complaints is less than .001 percent. This is less than one program out of every ten thousand broadcast. This is an insufficient basis on which to require that all stations will be required to keep records.

By contrast, a distinct minority of licensees have deployed revenue strategies that are furthered by indecent programming. It is this relatively small subset of licensees who draw the bulk of indecency complaints. For these licensees, the opposite economic dynamic is in play: They are affirmatively incented to transmit programming that risks allegations of indecency because that is the 'product' they are selling and the 'brand' that distinguishes them in the marketplace. FCC-imposed monetary forfeitures, when they have been levied at all, have been viewed by this subset of licensees as a mere operating cost.

It is an unfortunate fact of the contemporary broadcast industry landscape that such a relatively few licensees – whose revenue strategies rely upon airing programs that violate the Commission's indecency rules – are the reason the Commission has found it necessary to convene the instant rulemaking proceeding.

In this respect, we believe the tone and wording of the NPRM belie the real impetus of this proceeding. That impetus is not that the proposed rule would enhance enforcement "in order to improve adjudication of complaints." NPRM at ¶ 3. Rather, it is that a rule is necessary to improve the adjudication of complaints *lodged against a minority of licensees and a tiny fraction of all aired programming*. This is an important point because the absence of the Commission's genuinely objective characterization of the root causes for the proposed rule allows the framing

of the NPRM to read as if indecency violations are an industry syndrome that calls for an industry-wide solution. Because this is *not* the underlying industry reality, the Commission's regulatory response, which will affect all 15,000-plus stations in the country, is grotesquely overbroad.

V. An Alternative Approach is Preferable to the Proposed Rule

Inasmuch as the problem that gives rise to the FCC's need to strengthen its enforcement mechanisms is the result of the actions of an industry subset, we propose that the Commission fashion a rule that accords with that reality. A rule that is more narrowly tailored to address the actions of a much smaller class than the broadcast industry at large can be developed in a straightforward way. Under the FCC's current procedures, "[i]f there is sufficient information in the complaint that the facts, if true, suggest a violation may have occurred, the staff will commence an investigation by issuing a letter of inquiry that, among other things, requires the licensee to produce a recording or transcript of the program, if it has one. Otherwise, the complaint is generally dismissed or denied." NPRM at ¶ 5. Moreover, the Commission has held that where a licensee can neither confirm nor deny allegations of indecent broadcasts in a complaint, the broadcasts are deemed to have occurred. *See, e.g., Clear Channel Broadcasting Licensees, Inc*., 19 FCC Rcd 1768 (2004). For this reason, as the Commission notes in the NPRM, some broadcasters choose to "retain recordings on a voluntary basis." NPRM at ¶ 6.

In our view, the Commission's simply clarifying this evidentiary dynamic would be sufficient. If a complaint were lodged, a rebuttable presumption that the allegedly indecent material had in fact been broadcast would arise in the absence of contrary evidence such as, but not limited to, a broadcaster's recordings. Rather than adding a further layer of burdensome FCC regulation, licensees, in effect, would conduct their own cost-benefit analyses. On one hand, broadcasters such as SBBC, who have never had an indecency complaint lodged against them, may

decide that the incremental cost of retaining records for several months simply outweighs the probability that an indecency complaint will be filed and that a recording will be needed to defend against it. On the other hand, licensees whose promotional plans include pushing the limits of the indecency rules may decide that it is in their interest to retain recordings of their programming to protect themselves against the indecency charges that inevitably are raised given the nature of their programming.

Of course, this approach assumes that the probability of an economically painful forfeiture would be high unless the licensee could demonstrate that the allegations were ungrounded. Under the approach advocated here, the only way for a station to rebut the presumption of indecency created by a complaint making a *prima facie* case would be to produce a recording of the programming in question.

Under a better approach, the Commission could in effect reward licensees who have not had an indecency complaint lodged against them for some specified period of time, such as ten years or the eight years of a full license term. On the basis of that record of performance, the Commission would exempt such licensees from any requirement to retain records of their programming. If a complaint were lodged, and if the substance of the alleged offending broadcast were disputed by the licensee, it would be the burden of the complainant to provide compelling evidence (a tape or transcript) that the allegations were true. Conversely, any licensee who has been found to broadcast indecent programming within the past ten years would be required to retain program records as proposed in the NPRM.[3]

In essence, the approach advocated here is to improve the enforcement process by focusing the burden on those few stations that have produced the vast majority of enforcement com-

[3] A further alternative could be that, where a licensee has had no indecency complaints filed against it during a certain period of time, it would be required to retain its programming for a lesser period.

plaints. Alternatively, the first plan described above would clarify the evidentiary rubric applicable to licensees who elect not to retain program records, and then leave the matter to market forces. We do not believe that plan would present any serious threat of too many 'fuzzy' cases. As discussed earlier, the class of stations against which listeners or viewers will lodge indecency complaints is highly predictable. The probabilities on this score are by and large a function of the station's format and program lineup. One can predict with certainty, for instance, that a licensee who elects as a business judgment to air the "Howard Stern Show" will receive complaints. There is little mystery or unpredictability in the way such states of affairs play out. Stern notoriously disagrees with the concept of limiting indecent broadcasts, and will not stop flaunting the mandate of Congress in this regard until it becomes uneconomical for him to do so.

VI. Balancing of Interests

One final point concerning the public interest is in order. In this case, one's inclination might be to posit the interests of citizen-complainants on one side of the issue and the interests of licensees on the other. (For the broadcasters, it is the cost and trouble of the recording and retention system, as well as the potential chilling effect entailed by such process.) One might then conclude, as the NPRM implies, that the former outweighs the latter. The problem with this approach, however, is that it simplistically characterizes the interests of all licensees (i.e., their interest in being free from unduly burdensome regulation) as being identical. This is not true. Licensees who, as an affirmative strategy, air programming they know may draw an indecency finding should not be viewed as having interests identical and of equal weight compared to those who perennially stay clear of indecency infractions. There is a valid sense in which the interests of rule-abiding broadcasters are superior to those who are non-compliant or who, by the nature of their programming strategy, continually risk non-compliance. This being the case, a resolution

which imposes the burden of retaining program recordings on the one group but not the other, is fair and justifiable.

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For the foregoing reasons, the School Board of Broward County, urges the Commission to reject the proposal of the NPRM. At most, the FCC should adopt a rule which more fairly accommodates the various interests in play, and more fairly allocates the burdens of regulation in this arena.

Respectfully submitted

SCHOOL BOARD
OF BROWARD COUNTY

By: _____

Ronald D. Maines
Barry D. Wood
Stuart W. Nolan, Jr.

WOOD, MAINES & BROWN,
CHARTERED
1827 Jefferson Place, NW
Washington, DC 20036
(202) 293-5333

Its attorneys

Dated: August 27, 2004